

QUESTION PERIOD NOTE

Date:  
CCM#:  
Classification:

2016-05-20  
2016-011505  
PROTECTED

## Question Period Note

### 2015-2016 ANNUAL REPORT OF THE COMMISSIONER OF OFFICIAL LANGUAGES

#### ISSUE:

Response to the release of the 2015-2016 Annual Report of the Commissioner of Official Languages on May 19, 2016.

#### PROPOSED RESPONSE:

- **First, I would like to reaffirm the commitment of our government to the appointment of functionally bilingual justices to the Supreme Court of Canada.**
- **I would like to thank the Commissioner for his last Annual Report and for his excellent work as Commissioner of Official Languages for Canada over the past ten years.**
- **As you know, this Government is committed to ensuring access to justice in both official languages.**
- **We will carefully review the content of the report, as well as the first recommendation regarding the 2013 Study on the Bilingual Capacity of Superior Court Judiciary.**

*If pressed regarding the commissioner's second report which provides an overview of the Commissioner's intervention in the courts in the last 10 years:*

- **There is no doubt that the Commissioner's interventions before the courts have played an important role in the clarification of language rights generally, and have had a positive impact on official language minority communities.**
- **We will carefully review the content of this report in the coming weeks.**

## BACKGROUND:

Graham Fraser, Commissioner of Official Languages (COL), released his last Annual Report to Parliament on May 19, 2016. He also released a report titled *Protecting Language Rights: Overview of the Commissioner's Interventions in the Courts 2006-2016*. Both documents contain recommendations and comments on the actions of the Department of Justice and the Minister of Justice and Attorney General of Canada.

Mr. Fraser's mandate as Commissioner of Official Languages ends on October 2016.

### *Annual Report 2015-2016*

The Annual Report 2015-2016 contains only two recommendations. The first one is directed to the Minister of Justice of Canada:

The Commissioner of Official Languages recommends that, by October 31, 2016, the Minister of Justice and Attorney General of Canada commit to implementing the recommendations issued in the 2013 study *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*.

In his Annual Report, the COL mentions that the Minister of Justice at the time of the release of the 2013 Study on the Bilingual Capacity of the Superior Court Judiciary did not address its recommendations, despite the interest expressed by the Attorney General of Ontario as well as the Chief Justice of the Ontario Superior Court of Justice in working with the federal government on this issue.

The COL indicates in his Report that given the current Prime Minister's commitment to appoint bilingual judges to the Supreme Court of Canada, the Government should also take the necessary steps to ensure that an appropriate number of bilingual judges are appointed to superior and appeal courts across Canada. He also suggests in his letter to the Minister of Justice accompanying the Annual Report that a pilot project be put in place in the province of Ontario to implement the recommendations of the 2013 study.

The Annual Report's second recommendation addresses Bill S-209, An Act to amend the Official Languages Act (communications with and services to the public), which aims to modernize Part IV of the Official Languages Act:

The Commissioner of Official Languages recommends [...] that Parliament make Bill S-209 a priority so that the parliamentary committees examining it are able to conduct a diligent review...

Regarding this recommendation, the COL refers to his support of Bill S-209 and previous similar Bills aiming at modernising Part IV of the OLA by updating the notion of "significant demand" and taking into account the vitality of official languages communities in the determination of the significant demand.

He also refers to the ongoing court challenge *La Société Franco-Manitobaine v. A.G. Canada et al*, where the complainant maintains that the *Official Languages Regulations (Communications with and Services to the Public)* are inconsistent with section 20 of the *Canadian Charter of Rights and Freedoms* and with Part IV and VII of the OLA, because they contain an unduly restrictive definition of the word "Francophone", which does not include people in mixed families, newcomers, bilingual people and people that can converse in French.

### ***"Protecting Language Rights: Overview of the Commissioner's Interventions in the Courts 2006-2016"*** ***Report***

In this report, at the very end, the COL criticizes the Attorney General of Canada for his positions in the two last language rights cases in which the AGC was involved before the SCC:

The Government of Canada has intervened in proceedings filed under the Charter by joining provincial or territorial governments in espousing a restrictive interpretation of Canadians' language rights, particularly their education rights. For example, in *Nguyen*, the Attorney General of Canada submitted an interpretation of section 23 of the Charter that was not favourable to the rights of official language communities. The Attorney General of Canada also recently joined an appeal filed by Gilles Caron to the Supreme Court, supporting the position of the Government of Alberta. Such decisions are incompatible with the Government of Canada's commitment to promote the development of official language communities in accordance with Part VII of the Act.

In his letter accompanying the Annual Report, the COL also refers to the position taken by the Attorney General in these two cases and encourages the Attorney General to be mindful of the government's commitment to official language minority communities when intervening on language rights cases.

It is not the first time that the COL criticizes what he perceives to be as "restrictive" positions in language-rights cases.

## CONTACTS:

Prepared by:

Isabelle Bousquet and Renée Soublière

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613-960-3438

Approved by:

Laurie Wright

Tel. N°:

613-941-7890

NOTE POUR LA PÉRIODE DE QUESTIONS

Date : 2016-05-20  
No. CCM : 2016-011505  
Cote de sécurité : PROTÉGÉ

Note pour la période de questions

**RAPPORT ANNUEL 2015-2016 DU COMMISSAIRE AUX LANGUES  
OFFICIELLES**

**SUJET :**

Réponse à la publication du rapport annuel 2015-2016 du commissaire aux langues officielles le 19 mai 2016.

**RÉPONSE SUGGÉRÉE :**

- **Je voudrais d'abord réaffirmer l'engagement de notre gouvernement pour la nomination de juges effectivement bilingues à la Cour suprême du Canada.**
- **J'aimerais remercier le Commissaire pour son dernier rapport annuel et pour son excellent travail comme commissaire aux langues officielles du Canada au cours des dix dernières années.**
- **Comme vous le savez, notre gouvernement est engagé à assurer l'accès à la justice dans les deux langues officielles.**
- **Nous examinerons attentivement le contenu du rapport annuel, ainsi que la première recommandation visant l'étude de 2013 sur la capacité bilingue des juges des Cours supérieures.**

*Si des questions sont posées sur le deuxième rapport du commissaire, qui fournit un aperçu des interventions du commissaire devant les tribunaux dans les derniers 10 ans :*

- **Il n'y a aucun doute que les interventions du commissaire devant les tribunaux ont joué un rôle important dans la clarification des droits linguistiques en général et ont eu un impact positif sur les communautés minoritaires de langue officielle.**
- **Nous examinerons attentivement le contenu de ce rapport dans les semaines à venir.**

**PERSONNES-RESSOURCES :**

Préparée par :

Isabelle Bousquet et Renée Soublière

N° de tél. :

613-960-3438

Approuvée par :

Laurie Wright, Sous-ministre adjointe

N° de tél. :

613-941-7890

## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

#### ISSUE:

How will the Government deliver on its commitment to strengthen the process for appointing Supreme Court of Canada justices and ensure new appointees are functionally bilingual?

#### PROPOSED RESPONSE:

- My mandate letter reflects our Government's platform commitment: to work with all parties in this House and relevant stakeholders to make the process for appointing Supreme Court of Canada judges more transparent, inclusive and accountable.
- I would also like to reaffirm the commitment of our government to the appointment of functionally bilingual justices to the Supreme Court of Canada.
- I look forward to advance these commitments in the months ahead, and to hear from parliamentarians and other Canadians.
- The Supreme Court of Canada is one of Canada's most cherished national institutions, and deserves its outstanding reputation. While the appointment process can be strengthened, merit will remain our touchstone. Fortunately, Canada has a wealth of outstanding jurists from which to draw.

*If asked about the retirement of Justice Cromwell:*

- I thank Justice Cromwell for his distinguished service to Canada, both on and off the Bench. He has made remarkable contributions to the law and to the profession throughout his career, both as a professor and a jurist.
- Over the past seven and a half years, he has brought a thoughtful and practical perspective to his work on the Supreme Court. He has also been a national leader on access to justice.
- I will have more to say on this in the weeks ahead. In the meantime, I thank Justice Cromwell for his service and wish him the best.

**BACKGROUND:**

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

Since 2005, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a short-list of candidates. In one instance, the Minister appeared before a parliamentary committee to explain the government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

In 2004, the House Justice Committee examined the SCC appointment process and recommended both interim and longer-term measures to strengthen transparency and accountability. The dissenting (Conservative) report argued that the majority of recommendations did not go far enough.

There is no current or imminent vacancy on the SCC. The next mandatory retirement will occur in September 2018.

The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills (PMB) were introduced in recent years, but not adopted: Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)* introduced in May 2008 and Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)* introduced in June 2011. The most recent iteration of this PMB, Bill C-203, was introduced on December 9, 2015, by the NDP member for Drummond, François Choquette.

***Retirement of Justice Cromwell***

On March 22, 2016, the Supreme Court of Canada announced Justice Cromwell's retirement, effective September 1, 2016. The Government will need to establish a process for the selection of his replacement. The Court will wish an appointment in time for its fall session.

| <b>CONTACTS:</b>   |                                 |  |                                 |
|--|---------------------------------|--|---------------------------------|
| Prepared by:<br><br>Catherine McKinnon<br>Senior Counsel, Judicial Affairs, Courts and<br>Tribunal Policy, Public Law Sector | Tel. N°.:<br><br>(613) 954-1921 | Approved by:<br><br>Laurie Wright<br>Assistant Deputy Minister,<br>Public Law Sector | Tel. N°.:<br><br>(613) 941-7890 |



Department of Justice  
Canada

Ministère de la Justice  
Canada

Constitutional, Administrative and International Law Section  
Public Law Sector  
Justice Headquarters, EMB 3210  
284 Wellington Street  
Ottawa, Ont. K1A 0H8

MEMORANDUM / NOTE DE SERVICE

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|--|
| Security classification – Côte de sécurité |
| Protected B                                |
| File number – Numéro de dossier            |
| 1102994                                    |
| Date                                       |
| March 15, 2016                             |
| Telephone / FAX – Téléphone / Télécopieur  |
| 613-957-1411 / 613-941-1937                |

s.23

TO / DEST:

Laurie Wright, Assistant Deputy Minister  
Public Law Sector

FROM / ORIG:

Warren J. Newman, Senior General Counsel  
Constitutional, Administrative and International Law Section

Jonathan Shanks, Counsel  
Constitutional, Administrative and International Law Section

SUBJECT / OBJET:

**Bilingualism of Supreme Court Judges**

Comments/Remarques

[Redacted content]

**Pages 7 to / à 11  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Warren J. Newman

Jonathan Shanks

c.c. Edward (Ted) Livingstone (Director General, CAILS)  
Julie Wellington (Deputy Director General, CAILS)  
Michel Francoeur (Director, Official Languages Directorate)  
Stephen Zaluski (Director, Judicial Affairs, Courts and Tribunal Policy)

s.23

## SUPREME COURT OF CANADA APPOINTMENTS: MOVING FORWARD ON THE COMMITMENT

1

### ISSUE

The new government has promised to bring about changes in the way the federal government exercises its appointment power in relation to judges of the Supreme Court of Canada (SCC). These commitments have focussed on two areas: the bilingual capacity of new appointees; and strengthening the appointment process through greater openness, increased consultation and more meaningful parliamentary involvement.

### BACKGROUND

The precise timing of the next SCC vacancy is not clear. The next mandatory retirement date is not until September 2018 (the Chief Justice).



### THE COMMITMENT

We will ensure a representative and accountable process to advise on Supreme Court appointments, and make certain successful candidates are functionally bilingual.

We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual.<sup>1</sup>

### RECOMMENDED APPROACH

#### 1. BILINGUALISM REQUIREMENT FOR NEW APPOINTEES

The attached background paper, entitled "Bilingualism in the Supreme Court of Canada",

<sup>1</sup> "Accountable Supreme Court appointments", <<https://www.liberal.ca/realchange/accountable-supreme-court-appointments>>. This text is repeated—without the section in italics—in the "Real Change" policy platform at: <<https://www.liberal.ca/files/2015/08/a-fair-and-open-government.pdf>>.



## 2. STRENGTHENED APPOINTMENT PROCESS

Most recent proposals for reforms of the process have involved three key components: (1) more robust and transparent consultations; (2) some form of appointments advisory committee to vet candidates and develop a short-list; (3) some form of parliamentary review.

## ADDITIONAL CONSIDERATIONS



PROTECTED B

3

**s.21(1)(a)**

**s.21(1)(b)**



**BILINGUALISM IN THE SUPREME COURT OF CANADA****ISSUE****BACKGROUND**

The *Supreme Court Act (SCA)* does not contain any provision regarding the bilingual capacity of SCC judges. The Court is also expressly excluded from the duty of institutional bilingualism set out in s. 16 of the *Official Languages Act (OLA)*, to which other federal courts are subject. The Court has, however, implemented administrative measures to ensure that litigants appearing before the SCC are able to use the official language of their choice in written and oral pleadings. Simultaneous interpretation services are available to judges during oral hearings.

In recent years, unilingual appointments have been rare. Of the 17 appointments to the SCC since 1997, only two have been unilingual anglophones.<sup>1</sup> Even so, bilingual capacity has remained a point of controversy, and calls continue for the imposition of a bilingualism requirement on all new SCC appointees. Typical is the argument of Quebec Premier Philippe Couillard who, in his August 14, 2015, letter to federal party leaders, stated [translation]:

[I]n a bijuridical and bilingual country, to exercise their function, it is necessary for all of the judges of the SCC to master the French language. They must be capable of understanding, without intermediaries, the pleadings, the legislation, the case law and academic writings in French. It is important to ensure francophones an equal status before the highest court of Canada.

He therefore asked the next federal government to “commit to making bilingualism one of the required selection criteria for all candidates for appointment to the SCC, equal to merit, excellence and good behavior.”

The Commissioner of Official Languages has likewise argued that knowledge of both official languages should be a prerequisite for appointment as a SCC judge. Two recent Private Members Bills proposed to impose a bilingualism requirement, one through an amendment to the *SCA* and one through an amendment to the *OLA*.<sup>2</sup> Both were defeated. Francophone advocacy groups, as well as media commentators and academics, have also argued for the importance of SCC litigants being heard and understood by the Court in the language of their choice.

<sup>1</sup> Rothstein J. (2006) and Moldaver J. (2011).

<sup>2</sup> Bill C-208 (introduced June 2011) and C-548 (May 2008) respectively.

While not disputing the importance of linguistic duality on the SCC, opponents of a mandatory bilingualism requirement cite its potential impact on regional representation, particularly from western Canada, and the possible exclusion of otherwise-meritorious candidates.<sup>3</sup>

### *Considerations*



<sup>3</sup>

a 2011 paper based on survey data suggests that there are significant numbers of judges with bilingual capacity serving on provincial appellate courts outside Quebec. (Overall, 30 of 124 (24%) non-Quebec appellate judges were able to hear cases in French; another 42 (34%) had some knowledge of French; this included 14 (bilingual) and 19 (some French) from the four western provinces.) Grammond, S. and Power, M. 2011. *Should Supreme Court Judges be Required to be Bilingual?* Institute of Intergovernmental Relations, Queens University.

<sup>4</sup>

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s.21(1)(a)

s.21(1)(b)

s.23

Page 2 of 4  
Policy Briefing Book

**Page 18**  
**is withheld pursuant to sections**  
**est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**s.21(1)(a)**

**s.21(1)(b)**

APPROVED BY (ADM-LEVEL)  
Laurie Wright  
Assistant Deputy Minister  
Public Law Sector

KEY CONTACT  
Adèle Berthiaume / Stephen Zaluski  
Counsel / Director  
Public Law Sector / JACTP

Note

## **LE PROCESSUS DE NOMINATION DE LA COUR SUPRÈME DU CANADA**

### **QUESTION:**

*Comment le gouvernement compte-t-il mettre en œuvre son engagement de renforcer le processus de nomination des juges de la Cour suprême du Canada et assurer que les nouveaux juges nommés à la Cour suprême sont effectivement bilingue à un niveau fonctionnel.*

### **PROPOSED RESPONSE:**

- La lettre de mandat de la ministre de la Justice reflète l'engagement fait dans la plateforme de notre Gouvernement de travailler en collaboration avec toutes les parties à la Chambre des communes et les intervenants pertinents pour veiller à ce que le processus de nomination des juges de la Cour suprême soit transparent, inclusif et responsable.**
- Nous veillerons en outre au bilinguisme fonctionnel de tous les juges nommés.**
- Le gouvernement anticipe avec intérêt de mettre de l'avant ces engagements dans les mois à venir et de recevoir les points de vue des parlementaires et des autres canadiens.**
- Le 22 mars 2016, la Cour suprême du Canada a annoncé que le juge Cromwell prendrait sa retraite le 1er septembre 2016. Le gouvernement devra établir un processus pour la sélection de son remplaçant.**
- [REDACTED]**  
s.21(1)(a)
- La Cour suprême du Canada est une des institutions nationales les plus appréciées et elle mérite sa réputation de qualité. Bien que le processus de nomination puisse être renforcé, le mérite demeure notre pierre de touche. Heureusement, le Canada dispose de nombreux juristes exceptionnels parmi lesquels choisir.**

## BACKGROUND:

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

Since 2005, successive governments have used various processes for filling Supreme Court of Canada (SCC) vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a short-list of candidates. In one instance, the Minister appeared before a parliamentary committee to explain the government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

In 2004, the House Justice Committee examined the SCC appointment process and recommended both interim and longer-term measures to strengthen transparency and accountability. The dissenting (Conservative) report argued that the majority of recommendations did not go far enough.

The next mandatory retirement will occur in September 2018. However, on March 22, 2016 the Supreme Court of Canada announced that Justice Cromwell would be retiring September 1, 2016. The government will be putting in a process to fill this position.

The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills (PMB) were introduced in recent years, but not adopted: Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)* introduced in May 2008 and Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)* introduced in June 2011. The most recent iteration of this PMB, Bill C-203, was introduced on December 9, 2015, by the NDP member for Drummond, François Choquette.

On February 25, 2016 the Coalition Avenir Québec introduced a bill in the National Assembly regarding Quebec's participation in the appointment of the three Quebec judges to the Supreme Court of Canada. Under the bill, a selection committee composed of members from different sectors within Quebec would be responsible for assessing candidates' applications and for designating, in a report sent to the Members of the National Assembly, the three candidates considered most qualified to serve on the Supreme Court of Canada. The candidacies designated by the selection committee would be submitted to the National Assembly in a motion moved by the Premier. Each candidacy would require approval by three-quarters of the Members of the Assembly. The President of the National Assembly would then send a letter to the federal government communicating the names of the three candidates chosen by the Assembly.

## CONTACTS:

Prepared by:

Tel. N°.:

Approved by:

Tel. N°.:

## Roy, Brigitte

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**From:** Desbiens, Alex  
**Sent:** May 5, 2016 11:58 AM  
**To:** Jean-Marie, Céline  
**Cc:** Berthiaume, Adèle; Butcher, Nicole; van Rooijen, Vanessa; Crosby, Adair; Roy, Brigitte; Zaluski, Stephen  
**Subject:** FW: A-2016-00127 / CJM Review of records for an Access or a Privacy request / Revue de documents pour une demande Accès ou Protection de la vie privée (Please edit if required) l'AIPRP  
**Attachments:** A-2016-00127.pdf

Good morning,

Please find below JACTP's review and attached the document for review with highlight exclusions.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector  
Department of Justice Canada / Government of Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs  
Ministère de la Justice Canada / Gouvernement du Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

**From:** Berthiaume, Adèle  
**Sent:** 2016-May-05 9:59 AM  
**To:** Desbiens, Alex; Crosby, Adair; Roy, Brigitte; Zaluski, Stephen  
**Cc:** Butcher, Nicole; van Rooijen, Vanessa  
**Subject:** RE: A-2016-00127 / CJM Review of records for an Access or a Privacy request / Revue de documents pour une demande Accès ou Protection de la vie privée (Please edit if required) l'AIPRP

Bonjour Alex,

I have reviewed both the Executive Summary and the BN which are the subject of this request.

In relation to both, it is important to understand that the appointment process of judges to the Supreme Court of Canada (SCC) is a policy matter currently under review by the Minister of Justice and the PM (who has the responsibility for the appointment of judges to the SCC). Many aspects of the SCC appointment process have been the subject of much debate, even more so since the Reference to the SCC on the *Supreme Court Act*. Any interaction between the executive and the judiciary must be dealt with carefully as they represent different branches of government, and care must be given to respect and give effect to constitutional guarantees of judicial independence. This is especially true in the context of the appointment of SCC judges, which plays an important effect on the public's confidence and trust in the judicial system.

For these reasons, I have highlighted on a paper copy those portions of the ES and the BN we recommend should be exempted, and indicated the appropriate section under the AIA: Section 21(1) for most of the recommended exempt text (Advice to the Minister); and section 21(1) and section 23 (Solicitor-client privilege) for footnote 5 on page 3 of the BN (A0430207\_4-000004).

The remaining text of the ES and BN not highlighted is factual information which serves as background, and can be released.

Brigitte will bring you the package soon with the OPI Return Form (also attached above). Merci, Adèle

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De : Desbiens, Alex

Envoyé : 2016-Apr-28 4:57 PM

À : Berthiaume, Adèle; Crosby, Adair; Roy, Brigitte; Zaluski, Stephen

Cc : Butcher, Nicole; van Rooijen, Vanessa

Objet : FW: A-2016-00127 / CJM Review of records for an Access or a Privacy request / Revue de documents pour une demande Accès ou Protection de la vie privée (Please edit if required) l'AIPRP

Importance : Haute

Good afternoon,

We received the following request for review of records from the ATIP office regarding:

**« J'aimerais obtenir la note de breffage suivante destinée à la ministre. Le numéro de référence est le BN 2016-000311. Elle porte le titre: BILINGUISM AND THE SUPREME COURT OF CANADA. »**

The due date is **May 5, 2016**. The document for review is attached to this email.

Please remember to copy Nicole, Vanessa and me in your direct reply to the ATIP contact.

Thank you,

Alex Desbiens

Administrative assistant to the Assistant Deputy Minister, Public Law and Legislative Services Sector  
Department of Justice Canada / Government of Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tel : 613-941-7888

Adjoint administratif à la Sous-ministre adjointe, Secteur du droit public et des services législatifs  
Ministère de la Justice Canada / Gouvernement du Canada  
[Alex.desbiens@justice.gc.ca](mailto:Alex.desbiens@justice.gc.ca) / Tél : 613-941-7888

---

**From:** Jean-Marie, Céline

**Sent:** 2016-Apr-28 1:30 PM

**To:** \* ATIP-AIPRP PLLS

**Subject:** A-2016-00127 / CJM Review of records for an Access or a Privacy request / Revue de documents pour une demande Accès ou Protection de la vie privée (Please edit if required) l'AIPRP

**Importance:** High

(Le français suit)

The ATIP Office needs your assistance to process the records retrieved in response to a request received by the Department pursuant to the Access to Information Act to obtain:

**« J'aimerais obtenir la note de breffage suivante destinée à la ministre. Le numéro de référence est le BN 2016-000311. Elle porte le titre: BILINGUISM AND THE SUPREME COURT OF CANADA. »**

Please provide your recommendations regarding disclosure of the records, citing your rationale as well as any provision(s) which you feel may apply under the Act.

NOTE: Should you decide to print the documents, please select the **LEGAL** paper option as it improves quality of the image.

For related information regarding the Act, you may wish to consult the Centre for Information and Privacy Law's (CIPL) intranet site: Centre for Information and Privacy Law Section <http://jusnet.justice.gc.ca/eng/about-apropos/portfolio/pls-sddp/cipl-cdiprp.html> and Access to Information and Privacy Office (ATIP) Section's intranet site <http://jusnet.justice.gc.ca/eng/about-apropos/pdsg-pdwl/atip-aprp/index.html>

#### ACCESS REQUESTS ONLY

Additionally, please advise whether a Question Period Note, Questions and Answers or Media Lines have been or will be prepared by your office to assist the Minister in responding to any questions that may be raised pursuant to the disclosure of the records. If a material is required, please provide the ATIP Office with a copy.

SHAREPOINT - A copy of the relevant records has been exported to your Portfolio SharePoint library for your review [http://nationalteams/ms-slg/ATIP-AIPRP/atipsp-aprpsp/\\_layouts/viewlsts.aspx? BaseType=1](http://nationalteams/ms-slg/ATIP-AIPRP/atipsp-aprpsp/_layouts/viewlsts.aspx? BaseType=1) Please advise [celine.jean-marie@justice.gc.ca](mailto:celine.jean-marie@justice.gc.ca) by e-mail when your review has been completed, and save a copy of your annotated records, along with your recommendations, in your library on our SharePoint site.

**NOTE – SHAREPOINT LIBRARIES CAN ONLY BE ACCESSED BY THE PORTFOLIO ATIP CONTACT AND CANNOT BE USED IF THE RECORDS ARE HIGHER THAN PROTECTED B.**

In order to meet our statutory requirements under the Act, your response is required in our office by no later than end of business day (5:00pm eastern standard time) on May 5, 2016

Should you have any questions, do not hesitate to contact me by telephone at 613-907-3767 or email at [celine.jean-marie@justice.gc.ca](mailto:celine.jean-marie@justice.gc.ca).

Thank you for your assistance with this request.

---

Le Bureau de l'AIPRP a besoin de votre aide pour traiter les documents recueillis en réponse à une demande reçue par le ministère en vertu de la Loi sur l'accès à l'information pour obtenir:

**« J'aimerais obtenir la note de breffrage suivante destinée à la ministre. Le numéro de référence est le BN 2016-000311. Elle porte le titre: BILINGUISM AND THE SUPREME COURT OF CANADA. »**

S'il vous plaît faire parvenir vos recommandations concernant la divulgation des documents, en citant votre justification, et toute disposition(s) qui s'appliquerait selon vous en vertu de la Loi. Une description de toute disposition(s) appliquée(s) par le Bureau de l'AIPRP se trouve à la fin de ce courriel.

NOTE: Avenant que vous décidiez d'imprimer les documents, veuillez S.V.P. sélectionner l'option papier **LEGAL** afin d'améliorer la qualité de l'image.

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protection des renseignements personnels (<http://jusnet.justice.gc.ca/fra/apropos-about/pdwl-pdsg/aiprp-atip/index.html>).

#### DEMANDES D'ACCÈS SEULEMENT

De plus, veuillez s.v.p. indiquer si une Note pour la Période des Questions, des Lignes Médiatiques ou des Questions et Réponses ont été ou seront préparées par votre bureau afin d'aider le ministre à répondre aux questions qui pourraient être soulevées suite à la divulgation de ces documents. Si une note est requise, veuillez la fournir au Bureau de l'AIPRP.

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Afin de respecter l'échéance prévue par la Loi, votre réponse est requise dans notre bureau d'ici la fin de la journée ouvrable (17h00, l'heure de l'est) le 5 mai 2016.

Si vous avez des questions, n'hésitez-pas à communiquer avec moi par téléphone au 613-907-3767 ou par courriel au [celine.jean-marie@justice.gc.ca](mailto:celine.jean-marie@justice.gc.ca).

Merci pour votre collaboration à cette demande.

Céline Jean-Marie

ATIP Advisor / Conseillère en AIPRP

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Department of Justice  
Canada

Ministère de la Justice  
Canada

FOR INFORMATION

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TITRE/TITLE: Bilingualism and the Supreme Court of Canada

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

- In your mandate letter, the Prime Minister has asked that you "Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual". This memorandum discusses the bilingualism component of the commitment specifically.
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s.21(1)

s.21(1)(a)

s.21(1)(b)

Soumis par (secteur)/Submitted by (Sector): Public Law Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Sarah Geh

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: January 19, 2016

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Department of Justice  
Canada

Ministère de la Justice  
Canada

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FOR INFORMATION

2016-000311

## MEMORANDUM FOR THE MINISTER

Bilingualism and the Supreme Court of Canada

### ISSUE

This note provides information with respect to the Government's commitment to ensure that newly-appointed justices of the Supreme Court of Canada (SCC) are functionally bilingual.

### BACKGROUND

In your mandate letter, the Prime Minister has asked that you "Engage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual."

The *Supreme Court Act* (SCA) does not contain any provision regarding the bilingual capacity of SCC judges. The Court is also expressly excluded from the duty of institutional bilingualism set out in section 16 of the *Official Languages Act* (OLA), to which other federal courts are subject. The Supreme Court has, however, implemented administrative measures to ensure that litigants appearing before it are able to use the official language of their choice in written and oral pleadings. Simultaneous interpretation services are available to judges during oral hearings.

In recent years, unilingual appointments to the SCC have been rare. Of the 17 appointments to the SCC since 1997, only two have been unilingual Anglophones.<sup>1</sup> Even so, bilingual capacity has remained a point of controversy, and calls continue for the imposition of a bilingualism requirement on all new SCC appointees. Typical is the argument of Quebec Premier Philippe Couillard who, in his August 14, 2015 letter to federal party leaders, stated [translation]:

[I]n a bijuridical and bilingual country, to exercise their function, it is necessary for all of the judges of the SCC to master the French language. They must be capable of understanding, without intermediaries, the pleadings, the legislation, the case law and academic writings in French. It is important to ensure Francophones an equal status before the highest court of Canada.

He therefore asked the next federal government to "commit to making bilingualism one of the required selection criteria for all candidates for appointment to the SCC, equal to merit, excellence and good behavior."

s.21(1)(a)

<sup>1</sup> Rothstein J. (2006) and Moldaver J. (2011). [REDACTED]

s.21(1)

s.21(1)(a)

The Commissioner of Official Languages has likewise argued that knowledge of both official languages should be a prerequisite for appointment as a SCC judge. Private Member's Bill C-203, *An act to amend the Supreme Court Act (understanding the official languages)*, introduced by Mr. François Choquette (NDP) on December 9, 2015, proposes to impose a bilingual requirement. Two similar previous private members' bills proposed to impose a bilingualism requirement, one through an amendment to the SCA and one through an amendment to the OLA.<sup>2</sup> Both were defeated. Francophone advocacy groups, as well as media commentators and academics, have also argued for the importance of SCC litigants being heard and understood by the Court in the language of their choice.

s.21(1)(b)

While not disputing the importance of linguistic duality on the SCC, opponents of a mandatory bilingualism requirement cite its potential impact on regional representation, particularly from western Canada, and the possible exclusion of otherwise-meritorious candidates.<sup>3</sup>

#### CONSIDERATIONS

s.21(1)

<sup>2</sup> Former Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)*, introduced by Mr. Yvon Godin (NDP) on June 13, 2011, and former Bill C-548, *An Act to amend the Official Languages Act (understanding the official languages — judges of the Supreme Court of Canada)*, introduced by Mr. Denis Coderre (Liberal) on May 15, 2008, respectively.

<sup>3</sup> A 2011 paper based on survey data suggests that there are significant numbers of judges with bilingual capacity serving on provincial appellate courts outside Quebec. (Overall, 30 of 124 (24%) non-Quebec appellate judges were able to hear cases in French; another 42 (34%) had some knowledge of French; this included 14 (bilingual) and 19 (some French) from the four western provinces.) Grammond, S. and Power, M. 2011. *Should Supreme Court Judges be Required to be Bilingual?* Institute of Intergovernmental Relations, Queen's University.

s.21(1)

s.21(1)

**Page 29**  
**is withheld pursuant to sections**  
**est retenue en vertu des articles**  
**21(1)(a), 21(1)(b), 23**  
**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

s.21(1)(a)

**CONCLUSION**

**s.21(1)**



**PREPARED BY**  
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## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

**ISSUE:**

How will the Government deliver on its commitment to strengthen the process for appointing Supreme Court of Canada justices and ensure new appointees are functionally bilingual?

**PROPOSED RESPONSE: (Arial 10, bold)**

- **My mandate letter reflects our Government's platform commitment: to work with all parties in this House and relevant stakeholders to make the process for appointing Supreme Court of Canada judges more transparent, inclusive and accountable.**
- **We've also pledged to ensure future appointees are functionally bilingual.**
- **I look forward to advancing these commitments in the months ahead, and to hearing from parliamentarians and other Canadians.**
- **The Supreme Court is one of Canada's most cherished national institutions, and deserves its outstanding reputation. While the appointment process can be strengthened, merit will remain our touchstone. Fortunately, Canada has a wealth of outstanding jurists from which to draw.**

## BACKGROUND:

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual.

Since 2005, successive governments have used various processes for filling SCC vacancies. Some involved an advisory committee, composed exclusively or partially of parliamentarians, to recommend a short-list of candidates. In one instance, the Minister appeared before a parliamentary committee to explain the government's choice; in other cases, the nominees themselves appeared. For the three most recent appointments, neither an advisory committee nor a parliamentary hearing was used.

In 2004, the House Justice Committee examined the SCC appointment process and recommended both interim and longer-term measures to strengthen transparency and accountability. The dissenting (Conservative) report argued that the majority recommendations did not go far enough.

There is no current or imminent vacancy on the SCC. The next mandatory retirement will occur in September 2018.

The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills were introduced in recent years, but not adopted.

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**Question Period Note****SUPREME COURT OF CANADA APPOINTMENTS PROCESS****ISSUE:**

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|--|-----------------------------|---|----------------------------|
| Prepared by:<br><br>Stephen Zaluski<br>Director, Judicial Affairs, Courts and Tribunal Policy, Public Law Sector |                             |   |                            |

## Question Period Note

### SUPREME COURT OF CANADA APPOINTMENTS PROCESS

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On February 25, 2016 the Coalition Avenir Québec introduced a bill in the National Assembly regarding Quebec's participation in the appointment of the three Quebec judges to the Supreme Court of Canada. Under the bill, a selection committee composed of members from different sectors within Quebec would be responsible for assessing candidates' applications and for designating, in a report sent to the Members of the National Assembly, the three candidates considered most qualified to serve on the Supreme Court of Canada. The candidacies designated by the selection committee would be submitted to the National Assembly in a motion moved by the Premier. Each candidacy would require approval by three-quarters of the Members of the Assembly. The President of the National Assembly would then send a letter to the federal government communicating the names of the three candidates chosen by the Assembly.

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Laurie Wright  
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Public Law Sector

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**Note pour la période de questions****RETRAITE DU JUGE CROMWELL****QUESTION :**

Le 22 mars 2016, la Cour suprême du Canada a annoncé que le juge Cromwell prendrait sa retraite le 1<sup>er</sup> septembre 2016. Le gouvernement devra établir un processus pour la sélection de son remplaçant.

**RÉPONSE PROPOSÉE :** s.21(1)(a)

s.21(1)(b)

***Retraite du juge Cromwell :***

- **Je remercie le juge Cromwell pour les services distingués qu'il a rendus au Canada, tant au sein de la magistrature qu'à l'extérieur. Il a apporté des contributions remarquables à sa profession tout au long de sa carrière, tant à titre de professeur qu'à titre de juriste.**
- **Au cours des dernières sept années et demie, il a apporté un point de vue réfléchi et pratique à son travail à la Cour suprême. Il fut également un chef de file national dans le dossier de l'accès à la justice.**
- **J'en aurai davantage à dire à ce sujet dans les semaines à venir. Entre-temps, je remercie le juge Cromwell pour ses services et je lui souhaite la meilleure des chances.**

***Si des questions sont posées sur le processus de nomination :***

- **Comme l'indique ma lettre de mandat, notre gouvernement travaillera en collaboration avec toutes les parties à la Chambre des communes pour veiller à ce que le processus de nomination des juges de la Cour suprême soit transparent et inclusif et permette de rendre des comptes à la population canadienne.**
- **En outre, nous sommes résolus à consulter les intervenants pertinents, et nous nous assurerons que le successeur du juge Cromwell est bilingue à un niveau fonctionnel.**

s.21(1)(a)

s.21(1)(b)

**BACKGROUND:**

On March 22, 2016 the Supreme Court of Canada announced that Justice Thomas Cromwell will be retiring from the court effective September 1, 2016.

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

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| PERSONNES-RESSOURCES :  | Nº de tél. : | Approuvée par :             | Nº de tél. : |
|---|--------------|-----------------------------|--------------|
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## Question Period Note

### RETIREMENT OF JUSTICE CROMWELL

#### ISSUE:

On March 22, 2016, the Supreme Court of Canada announced Justice Cromwell's retirement, effective September 1, 2016. The Government will need to establish a process for the selection of his replacement.

#### PROPOSED RESPONSE:

s.21(1)(a)

s.21(1)(b)

#### *Retirement of Justice Cromwell:*

- **I thank Justice Cromwell for his distinguished service to Canada, both on and off the Bench. He has made remarkable contributions to the law and to the profession throughout his career, both as a professor and a jurist.**
- **Over the past seven and a half years, he has brought a thoughtful and practical perspective to his work on the Supreme Court. He has also been a national leader on access to justice.**
- **I will have more to say on this in the weeks ahead. In the meantime, I thank Justice Cromwell for his service and wish him the best.**

#### *If Pressed on Appointment Process:*

- **As stated in my mandate letter – our Government will work with all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians.**
- **As well, we are committed to consulting with relevant stakeholders. And we will ensure that Justice Cromwell's successor is functionally bilingual.**

s.21(1)(b)

**BACKGROUND:**

On March 22, 2016 the Supreme Court of Canada announced that Justice Thomas Cromwell will be retiring from the court effective September 1, 2016.

The Liberal Party platform, echoed in the Minister's mandate letter, promised that:

"We will work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court. This includes proper consultation with the provinces, provincial bar associations, provincial appellate and superior courts, and the Chief Justice of the Supreme Court. This process would also ensure judicial appointments to the Supreme Court are functionally bilingual."

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|  |                           |   |                           |
|--|---------------------------|---|---------------------------|
| <b>CONTACTS: (Arial 10, bold)</b><br>Prepared by:<br>Catherine McKinnon, Senior Counsel, Judicial Affairs, PLLSS | Tel. Nº.:<br>613-954-1921 | Approved by:<br>Laurie Wright, ADM<br>PLLSS | Tel. Nº.:<br>613-941-7890 |
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## Advice to the Minister

**BILINGUAL CAPACITY OF SUPREME COURT OF CANADA  
AND SUPERIOR COURT JUDGES**

**TOPIC:** How will you implement your Government's commitment to ensure that new appointees to the Supreme Court of Canada are functionally bilingual? How will you ensure Canadians have access to justice in both official languages before provincial and territorial superior courts?

**CONTEXT:** The Liberal Party platform and your mandate letter commit to ensuring that those appointed to the Supreme Court are functionally bilingual. CJC members may ask how the Government intends to implement this commitment, and/or how it will respond to calls for increased bilingual capacity in the superior courts.

**PROPOSED RESPONSE:**

- **The Government recognises that access to justice in both official languages is an important issue for Canadians.**
- **With respect to the Supreme Court of Canada, it is important that litigants feel at home in the official language of their choice in one of Canada's most fundamental national institutions.**
- **As we move forward on our commitments to ensure that future appointees are functionally bilingual, and that the Supreme Court appointment process is transparent, inclusive and accountable, the Government will be consulting widely – in Parliament and beyond. I welcome the judiciary's views in this regard.**
- **As you know, language considerations already form part of the appointment process for superior court judges. While merit remains the principal criterion, bilingual capacity is taken into consideration when assessing a candidate's suitability to be a judge.**
- **I would like to highlight the continued importance of consultations with chief justices on the bilingual capacity of superior courts.**

## BACKGROUND:

### Supreme Court of Canada

The Liberal Party platform, echoed in the your mandate letter, promised that the Government would "work with all parties in the House of Commons to ensure an inclusive, representative, transparent, and accountable process to advise on appointments to the Supreme Court" and "ensure judicial appointments to the Supreme Court are functionally bilingual."

The Commissioner of Official Languages and others have argued for a bilingual requirement for SCC judges, to ensure they can read written pleadings and understand oral arguments in the official language in which they are presented, without the need for translation or simultaneous interpretation. Two related Private Members Bills (PMB) were introduced in recent years, but not adopted. The most recent iteration of this PMB, Bill C-203, was introduced on December 9, 2015, by the NDP member for Drummond, François Choquette.

### Provincial and Territorial Superior Courts

There have been complaints for many years relating to the difficulty of accessing justice equally in both official languages – for example, not having oral or written pleadings understood, delays involved when French language trials are requested, and the resulting additional costs.

In his 2013 report, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Judiciary for Superior Courts*, the Commissioner of Official Languages made recommendations to ensure access to justice in both official languages before provincial and territorial superior courts. A 2014 CBA Resolution endorsed these recommendations and encouraged the Minister of Justice to implement them.

Linguistic considerations already form part of the federal judicial appointments process. For example, the Personal History Form requires candidates to indicate their ability to hear and conduct a trial in the other official language. The Office of the Commissioner for Federal Judicial Affairs offers a language training program for federally-appointed judges, which has been successful in helping judges maintain and enhance their linguistic capacity.

### Federal Courts

The bilingualism requirements for federal courts such as the Federal Court, the Federal Court of Appeal, and the Tax Court of Canada are contained in the *Official Languages Act*, section 16.

s.21(1)(a)

s.21(1)(b)

Prepared by: Adèle Berthiaume  
Date: March 15, 2016

Approved by: Laurie Wright  
Date: March 18, 2016